

ANALYSIS

Department of Justice General Counsel Division Report

Analyst: John Borden

Request: Acknowledge receipt of a report on a proposed legal services pilot program.

Analysis: The budget report for SB 5514 (2021), the Department of Justice's primary budget measure, included the following budget note:

The Department of Justice is to report to the Joint Committee on Ways and Means during interim Legislative Days prior to the Legislative Session in 2022 with a proposed pilot program detailing how the department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state.

The genesis of the budget note was that past legislatures expressed concern over the growth of legal costs and limited Department of Justice (DOJ) - General Counsel Division (GCD) efforts to address the issues of client-agency coordination, effective service delivery, and cost control. This is also an opportune time for such efforts to take hold given the number of major state and federal funding initiatives that, if well managed now from a legal perspective, could avoid significant future legal costs.

Background

GCD provides a broad range of legal services to over 100 state agencies, boards, and commissions. The GCD is divided into the following sections: Business Transactions; Business Activities; Government Services; Health and Human Services; Tax and Finance; Natural Resources; and Labor and Employment.

The Division has a 2021-23 legislatively adopted budget of \$76.6 million Other Funds and 170 positions (167.68 FTE), of which 119 are budgeted attorney positions. The revenue to support the Division's budget comes from the Legal Services Fund and legal service billings to state agencies.

In addition, the Interim Joint Committee on Ways and Means (January 2022) recommended the Legislature in 2022 approve an increase of \$2.3 million in the Other Funds expenditure limitation and the nine permanent full-time Senior Assistant Attorney General positions (4.74 FTE) for the GCD to provide legal services to select state agencies (e.g., Department of Transportation and the federal Infrastructure Investment and Jobs Act; Housing and Community Services Department work related to state and federal housing initiatives; among others). This increase in supplemental funding, if approved, would be consistent with actions by the Legislature in 2019 and 2021, which undertook concerted efforts to right size the resourcing of the GCD, and each of the division's various sections, due to the division's pivotal role in state government.

General Counsel - Current Service Delivery Model

Successive attorney generals have adhered to a policy of a consolidated legal service delivery model. This model has many advantages including, for example: independent and consistent legal analysis, depth of expertise, ability to prioritize workload, a common platform for case management, and economies of scale. The primary disadvantage of this model is the relinquishment of agency control to the attorney general.

The current and former attorney generals, however, have allowed some DOJ attorneys to “co-locate” within agencies, which physically places or imbeds an attorney within an agency. This practice is only on a part-time basis and for brief periods of time. Co-location was previously reported by DOJ in 2018 to include 10 agencies (Department of Business and Consumer Services - Building Codes; State Board of Examiners for Engineering and Land Surveying; Board of Nursing; Board of Pharmacy; Public Utility Commission; Department of Land Conservation and Development; Department of Transportation; Department of Revenue; Oregon Health Authority; and Department of Human Services).

Statute does provide an exemption for some entities from the requirement or mandate to use only DOJ provided legal services. DOJ use of this exception to the agency’s consolidated legal service delivery model is noteworthy. Statute allows DOJ to employ Special Assistant Attorney Generals (SAAG), which DOJ has typically used to hire private law firms for specialized legal support or to potentially resolve conflicts of interest. DOJ has expanded the use of this statute and model to authorize in-house legal counsel for at least one state agency (State Treasury).

Findings of a Prior Legislative Report

The Legislature in 2017 made the following request of DOJ, per a budget note in HB 5015, and which was satisfied with a report to the Legislature in 2018:

The Department of Justice (DOJ) is to submit a report to the Legislature during the 2018 Session with options for providing more effective and cost-efficient legal and other services to state agencies, including a feasibility study related to alternative service models.

The major conclusions of the 2018 report were:

- DOJ’s consolidated service delivery model has proven to be a fundamentally sound approach; however, one criticism of the application of the model is a dependence upon agency-initiated and driven legal requests. In other words, there appears to be a lack of an overarching strategic approach to consciously and deliberately targeting legal services to high cost and high-risk areas of state government.
- DOJ also should evaluate the expanded use of both co-location and SAAG authorized attorney services for state agencies as well as evaluate the co-location of non-attorney staff, including paralegal positions to identify and possibly triage emergent legal issues.
- DOJ’s report would have been strengthened if the agency had conducted a survey of client agencies to understand firsthand customer concerns and identify suggestions for improvement.

General Counsel - Proposed Service Delivery Model

GCD assigns a “contact attorney” to each agency, as directed by administrative rule. The GCD report proposes a “Lead Contact Counsel” pilot program. This pilot program, which has already been commenced, is described in report as being:

“...a fine tuning of the General Counsel Division’s contact counsel model, focusing on more intentional integration of assigned contact counsel at the client agency’s executive levels. If successful, the pilot project would result in a paradigm shift in how contact counsel deliver legal services to certain larger agencies in that Lead Contact Counsel would receive policy direction directly from the agency’s executive staff and incorporate those directives in the advice provided throughout the agency.

The GCD reports that only a single agency, the Oregon Health Authority, has been assigned Lead Contact Counsel. The GCD report did not provide information on the number of agencies currently participating in a co-location arrangement.

Report Analysis

GCD’s report is of limited scope and utility, as compared to the legislative expectation for the budget note. The report does not provide foundational information related to the division’s client agencies that incur “...high legal costs and that pose heightened litigation risk to the state” nor how the division’s legal services or proposed pilot program would be targeted to such agencies. In fact, the division undertook no survey of client agencies related to this report nor otherwise identified those agencies with “...high legal costs and that pose heightened litigation risk to the state.” Instead, the division has proposed a pilot program that provides general legal services to only a select few large-scale agencies and at a higher cost to the participating agencies, as opposed to offering legal services tailored to the specific needs and risks of a broad array of agencies.

The report underscores the concern that has continued to persist that communication between GCD and client agencies requires improvement to ensure the proper provisioning of legal services. The report also highlights the fact that the GCD continues to operate without an overarching strategic approach to target legal services consciously and deliberately to high cost and high-risk areas of state government, which was one of the key findings of the 2018 report to the Legislature.

Recommendation: The Legislative Fiscal Office recommends acknowledging receipt of the report with instruction that the Department of Justice - General Counsel Division be directed to return to the Legislature in 2023 to report on results of the Lead Contact Counsel pilot program and on a more refined pilot program proposal specifically targeted at demonstrating how the department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state.



DEPARTMENT OF JUSTICE

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January 13, 2022

Senator Elizabeth Steiner Hayward, Co-Chair
Representative Dan Rayfield, Co-Chair
Interim Joint Committee on Ways and Means
900 Court Street NE
H-178 State Capitol
Salem, OR 97301

Dear Co-Chairpersons:

Nature of the Request

The Oregon Department of Justice is responding to the following budget note:

HB 5014 (Chapter 427, Oregon Laws 2021)

Budget Note #4 – General Counsel

The Department of Justice is to report to the Joint Committee on Ways and Means during interim Legislative Days prior to the Legislative Session in 2022 with a proposed pilot program detailing how the department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state.

Agency Action

The Department of Justice is submitting the attached report in response to the budget note. The report addresses the following topics:

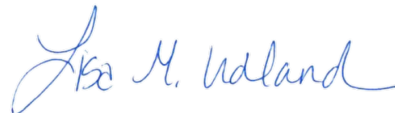
- 1) General Counsel Division Overview and Organization Chart
- 2) General Counsel Division Services and Section Descriptions
- 3) Existing Contact Counsel Model and Co-Location History

- 4) Proposed Pilot Program
 - a. Statement of Need
 - b. Lead Contact Counsel
 - c. Structure and Engagement
 - d. Duties
 - e. Cost to Client
 - f. Pilot Project Concept
- 5) Expected Outcomes and Potential Barriers

Action Requested

The Department of Justice requests that the Joint Committee on Ways and Means acknowledge receipt of the report.

Sincerely,



LISA M. UDLAND
Deputy Attorney General

cc: Renee Stineman, Chief Counsel, General Counsel Division
William O'Donnell, DOJ Chief Financial Officer
Jennifer Friesen, DOJ Senior Budget Analyst
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State of Oregon
Department of Justice



General Counsel –Lead Contact Counsel
Pilot Program Update

January 2022

1.0 Agency Overview

Mission: The mission of the Oregon Department of Justice (DOJ) is to serve state government and to support safe and healthy communities throughout Oregon by providing essential justice services.

The Attorney General and the Department's eight divisions are dedicated to:

- Providing ethical, independent and high-quality legal services to state government;
- Safeguarding consumers from fraud and unfair business practices;
- Fighting crime and helping crime victims;
- Advocating for vulnerable children;
- Supporting families through the collection of child support;
- Enforcing environmental protections;
- Defending the civil rights of all Oregonians; and
- Pursuing justice and upholding the rule of law.

2.0 General Counsel Division Overview

2.1 Enabling Legislation/Program Authorization

The Office of the Attorney General and DOJ are established by ORS 180.010 and 180.210, respectively. ORS 180.210 denominates the Attorney General as “the head of [the Department of Justice] and the chief law officer for the state and all its departments.” The General Counsel Division (GCD) exists primarily to fulfill the Attorney General's statutory duties to “assign to each agency, department, board or commission an assistant who shall be the counsel responsible for ensuring the performance of legal services requested by the agency, department, board or commission” and “when requested, perform all legal services for the state or any department or officer of the state.” ORS 180.060.

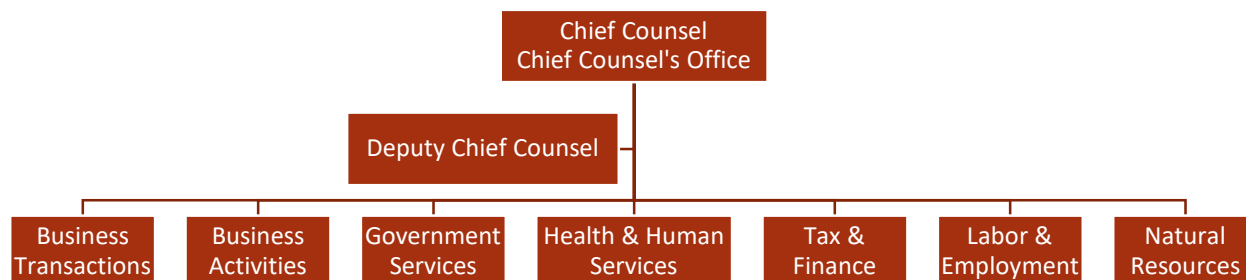
2.2 General Counsel Division Structure

State agencies, advised by General Counsel Division attorneys, generate legal issues as varied and diverse as the activities of these agencies. To effectively deal with this broad range of subject matter responsibilities, GCD staff is organized into the following sections:

- Chief Counsel's Office;
- Tax and Finance Section;
- Government Services Section;
- Natural Resources Section;
- Government Services Section;
- Labor and Employment Section;
- Health and Human Services Section;
- Business Transactions Section; and
- Business Activities Section.

This organization ensures legal matters are assigned to attorneys with the appropriate experience and expertise to address those matters effectively and efficiently.

General Counsel Organization Chart



2.3 Services Provided

GCD provides a full range of essential legal services to state agencies, boards, commissions, and officers. Both in its own operations and through the services it provides, GCD advances excellence in state government. GCD promotes improved government transparency through its role in construing and applying the Public Records and Public Meetings Laws. GCD also supports the public's trust in government by ensuring consistent interpretation of state and federal law across all state agencies through its written and oral advice, production of the Attorney General's public law manuals, organization of the Attorney General's biennial Public Law Conference, and preparation of published Attorney General Opinions and Chief Counsel Letters of Advice. GCD helps increase efficiency and accountability in state government through its drafting and performance of legal sufficiency review of state agencies' most significant contracts.

GCD partners with its clients, providing essential legal services that enable clients to perform their routine functions and to address significant emergent issues. A small sample of services GCD provides includes:

- Public contracts drafting assistance, advice and legal sufficiency review;
- Advice on rulemaking procedures and on the substantive content of proposed rules;
- Representation in contested case hearings to enforce laws regulating health services providers and licensed professionals, protecting Oregon workers, ensuring the safety of buildings and utilities and environmental protection;
- Enforcing election and campaign finance laws in partnership with the Secretary of State;
- Advising the state's agencies regarding public safety laws;
- Protecting Oregonians by providing consistent and sound legal advice to state agencies that administer critical services to the people of Oregon;
- Drafting formal Attorney General Opinions and Chief Counsel Letters of Advice;
- Preparing the Attorney General's manuals on Administrative Law, Public Records and Meetings, and Public Contracts;

- Planning and supervising the content and presentation of the Attorney General's Public Law Conference that provides training to several hundred state agency personnel;
- Providing training to client agencies on public records and meetings laws, the public contracting laws, personnel and employment issues, administrative rule making, and other topics.

GCD provides essential legal services in connection with many of the state's most significant and high-profile public projects and issues.

2.3.1 Chief Counsel's Office

The Chief Counsel is the division administrator and reports directly to the Deputy Attorney General. The Chief Counsel's Office oversees GCD's legal work and top-level management of GCD's attorneys and staff.

2.3.2 Tax and Finance Section

The Tax and Finance Section's work generally falls into two substantive areas: tax and finance. On the tax side, the section represents the Department of Revenue and the Employment Department, providing legal advice and litigation representation, encompassing all areas of tax law. On the finance side, the section advises the Office of the State Treasurer and Oregon Investment Council with respect to the state's banking, investment and borrowing activities. The finance attorneys also assist state agencies in negotiating loans, grants or other financial transactions, drafting the documents for those transactions, and reviewing grant agreements for legal sufficiency.

2.3.3 Government Services Section

This section's attorneys provide a broad spectrum of legal services to client agencies, such as providing advice on operations of the state's prisons; providing legal services to state law enforcement agencies, juvenile and correctional facilities, and the parole board; reviewing contracts for highway projects; and representing the Secretary of State's constituent divisions in contested case hearings. This section's attorneys are involved in the state's most critical and visible projects, including for example, Oregon Department of Transportation's Rose Quarter project.

2.3.4 Natural Resources Section

Attorneys in the Natural Resources Section provide legal advice, representation in administrative proceedings, and litigation support services to state agencies that are responsible for protecting Oregon's environment and helping to promote the sustainable use of Oregon's natural resources. The substantive issues encountered in the section crosscut many areas of law and a wide variety of regulatory regimes. The matters handled by section attorneys are complex and critical to protect Oregon's environment and the preservation of Oregon's natural resources. For example, attorneys in the section represent and advise the state agencies involved in cleanup of the Portland Harbor Superfund Site.

2.3.5 Labor and Employment

The Labor and Employment Section provides employment and labor law advice to all of state government, including its various agencies, boards, and commissions. Areas of practice include collective bargaining, labor disputes, employment arbitrations, performance management, workplace investigations, policy drafting and review, state and federal anti-discrimination and leave laws, and wage and hour laws.

The section attorneys also maintain an active litigation case load that includes employment arbitrations and administrative hearings before the Employment Relations Board and the Employment Department. The attorneys also provide training to state managers and, in some instances, agency personnel regarding various workplace issues. The substance of the training is tailored to meet the specific needs of the requesting agency, board, or commission.

2.3.6 Health and Human Services Section

Attorneys in the Health and Human Services Section provide advice and litigation representation to state agencies such as Oregon Health Authority (OHA) and Department of Human Services (DHS). These agencies plan and provide Oregonians with publicly funded or administered health and social services, including Oregon's Medicaid and health insurance exchange programs. Section attorneys also advise the Oregon Public Health Division on an array of issues, including those related to the state's COVID-19 response.

2.3.7 Business Transactions Section

The Business Transactions Section attorneys advise clients, assist in document drafting and provide legal sufficiency review of the state's complex transactions. They also provide training for state agency personnel on contract and transaction issues.

2.3.8 Business Activities Section

The Business Activities Section represents the state's professional and occupational licensing and regulatory agencies, providing legal advice on a wide variety of issues and representing them in regulatory and administrative enforcement proceedings.

2.4 Existing Contact Counsel Model and Co-location History

As required by ORS 180.060(8), GCD assigns a contact attorney to a client agency. For larger agencies, different contact counsel may be assigned to different divisions within the agency. For smaller agencies, one lawyer may be assigned as contact counsel for the agency as well as other agencies. The contact counsel is ordinarily an agency's (or in the case of larger agencies, the division's) principal point of contact with the DOJ. Contact counsel deliver a range of advice from informal advice delivered in a brief telephone call to formal written opinions addressing multiple, complex legal issues. In addition to mastering the laws and legal principles that govern or bear on the agency's operations, the contact counsel must understand the agency's needs and

priorities to deliver advice that provides clients with a range of options for addressing legal issues within the context of those needs and priorities.

Under Attorney General John Kroger (2009-2012), a few contact counsels were co-located with clients, working regularly scheduled days in client agency offices. Agencies that have had co-located contact counsel include, for example, OHA and Oregon Department of Transportation. The goals for these co-located attorneys included developing a better understanding of the client agency's needs and goals, enhancing the attorney's availability and responsiveness to client needs, helping the client agency better identify when legal services are needed, and better coordinating all legal services being provided to the agency. The concept was that having contact counsel more physically accessible to agency staff working at the program level would drive outcomes consistent with these goals.

2.5 General Counsel Division Funding

The General Counsel Division operates with position authority and Other Funds expenditure limitation. Under ORS 180.160, primary funding for GCD's operations comes from direct billing to agency clients for services rendered. These billings are based on a billed-hour model.

3.0 Proposed Pilot Program – Lead Contact Counsel

This pilot project is essentially a fine tuning of the General Counsel Division's contact counsel model, focusing on more intentional integration of assigned contact counsel at the client agency's executive levels. If successful, the pilot project would result in a paradigm shift in how contact counsel deliver legal services to certain larger agencies in that Lead Contact Counsel would receive policy direction directly from the agency's executive staff and incorporate those directives in the advice provided throughout the agency.

3.1 Statement of Need

Executive leadership of the state's largest agencies manage multiple divisions with layers of management. This leadership is responsible for setting the state's most significant policies and implementing a diverse array of complex programs, all guided by the agency's mission, vision, and core values. General Counsel Division contact counsel support those divisions and programs. Other DOJ counsel provide additional legal support, including defending legal challenges to implementation or operation of an agency program. In the current model, contact counsel typically works with program staff to focus on program-specific agency needs. While this focus provides contact counsel with specific context and allows for development of highly specialized expertise, the distance from executive leadership of the agency can create a disconnect between the agency's priorities and direction and the legal services provided. In addition, distance from agency executive leadership can make it hard to ensure that the Department is appropriately coordinating legal services to the agency.

To ensure DOJ legal services align with an agency's core value-driven priorities and critical timelines, GCD contact counsel need to integrate into the agency's executive leadership planning and processes and have a reasonable amount of authority to direct and allocate resources within

the agency and DOJ. This authority must be exercised consistent with the direction of both the agency and DOJ.

3.2 Lead Contact Counsel – Phase I, Development of the Concept

Over the last several years, the General Counsel Division partnered with OHA to align legal services provided to OHA with the policy directives of the agency's executive staff. In this effort, the goals were essentially the same as for attorneys co-located during the Kroger administration; but those goals had not been met with co-location alone. GCD and the agency considered ways, beyond physical presence, to better integrate DOJ counsel into OHA's executive leadership's management of agency business and coordinate DOJ legal services provided to OHA.

Recently, an existing OHA contact counsel was transformed into what is referred to in this report as a Lead Contact Counsel. That Lead Contact Counsel has been assigned to OHA to serve as a test case and help develop and explore the viability of the new concept. This Lead Contact Counsel prototype is generally described below. To date, OHA is the only agency with an assigned Lead Contact Counsel.

This report outlines the Lead Contact Counsel role and explains GCD's vision for offering Lead Contact Counsel to additional agencies (though, as described below, in GCD's current view, Lead Contact Counsel would be appropriate for only a few of the state's largest agencies).

3.2.1 Structure

A Lead Contact Counsel is assigned by GCD to the agency's Director's Office, rather than to a specific division or program. The Lead Contact Counsel provides and coordinates legal services within the agency and between the agency and DOJ. The agency and Lead Contact Counsel (with appropriate DOJ input) jointly determine the attorney's work location schedule, which may include some days in Department offices, some days in agency offices and/or some days working remotely. While the Lead Contact Counsel is heavily immersed in the agency's business, the attorney remains a DOJ employee and Assistant Attorney General, reporting to their DOJ supervisor and, ultimately, to the Attorney General both administratively and for legal policy decisions.

3.2.2 Engagement

The Lead Contact Counsel participates in regular leadership meetings and is treated as part of the leadership team. The attorney is also involved in regular program management meetings, particularly when decisions regarding the implementation of new, controversial or legally high-risk programs are contemplated.

This higher executive level of engagement allows the Lead Contact Counsel to know the agency's vision and larger goals and observe how the agency functions. This also allows the attorney to understand the agency's business needs and stay informed about various key agency projects, to identify and address legal issues early and help the agency in analyzing alternatives to help mitigate legal risks. Early advice saves agency time and cost by avoiding commitment to

a particular project and expending funds only to have legal barriers come to light later, which may result in project delays or additional investment.

The client agency holds regular check-ins to brief the Lead Contact Counsel on important issues impacting the agency and to provide feedback on how they may better assist the agency.

3.2.3 Duties

A Lead Contact Counsel assists the agency's executive leadership team with any legal issue that may be identified or when leadership requests advice of counsel or other legal services. While the agency remains in control of determining what legal services DOJ provides, a Lead Contact Counsel independently identifies and brings to the client agency's attention legal matters about which it appears the agency would benefit from DOJ advice.

Perhaps most importantly, a Lead Contact Counsel serves as a liaison, coordinating agency work with other lawyers in the General Counsel Division as well as other divisions in DOJ, such as the Trial or Appellate division. This coordination helps provide the agency with more direct access to DOJ resources and ensure the legal services are coordinated based on the Lead Contact Counsel's understanding of the agency's business needs and policy directives. It also helps ensure advice is consistent.

Also, to the extent necessary, the Lead Contact Counsel works with both the DOJ and the client agency's budget and planning staff to help anticipate increased agency demand for DOJ legal services and coordinate related budget requests.

3.2.4 Cost to Client

As the Lead Contact Counsel is assigned exclusively to the agency (with possible exceptions), that attorney bills virtually all their annual billable time to the client agency. To the extent the attorney works on a specific project, that time may be billed to those projects, as the agency directs. However, much of the Lead Contact Counsel's time is spent working directly with leadership and billed to a client agency leadership billing number.

3.3 Lead Contact Counsel – Phase II, Pilot Project

3.3.1 Pilot Project Concept

GCD intends to continue to support the OHA prototype of the Lead Contact Counsel. In addition, GCD intends to explore whether this prototype may improve legal services for other agencies. If it appears appropriate, GCD would identify the additional agency or agencies as pilot agencies and work with them to develop an agency-specific pilot Lead Contact Counsel plan.

3.3.2 Characteristics of Potential Additional Pilot Agency

Potential additional pilot agencies should possess the following characteristics:

- Large in terms of number of staff and programs;
- Responsible for diverse and complex programs;
- Willingness to engage DOJ counsel extensively (typically demonstrated by historic use of DOJ legal services);
- Willing to integrate counsel at executive level; and
- Adequate legal budget to pay additional DOJ legal service charges.

3.3.3 Identified Potential Additional Pilot Agency

DDHS recently expressed interest in assignment of a Lead Contact Counsel. The agency's stated goals include developing better informed, quicker decision-making processes accomplished by integrating counsel broadly in the agency's mission and engaging counsel on the front end of major projects. GCD and agency are currently exploring the feasibility of the agency's integration of a Lead Contact Counsel.

GCD has identified other potential agencies based on size and complexity of programs alone (including, for example, Oregon Department of Transportation and Department of Administrative Services). GCD intends to discuss this pilot with these agencies to determine whether they are a possible fit.

4.0 Expected Outcomes and Potential Barriers

Successful engagement of a Lead Contact Counsel should result in value-driven prioritization of legal services as well as legal strategy. Lead Contact Counsel should improve information flow, keeping agency and DOJ leadership adequately informed.

As described by OHA, success is qualitative not quantitative. Success is reflected, in large part, in the clients' improved satisfaction in its ability to accomplish consistent legal strategy reflecting an understanding and appreciation for the agency's core values. These successful outcomes occur when the Lead Contact Counsel is integrated to a degree that the attorney can infuse leadership's intent, culture, values, into the agency's day to day work to provide better informed legal advice.

Significant barriers must be overcome to accomplish these successes. For example, lack of trust, lack of time/funding may prevent adequate integration of a Lead Contact Counsel. These barriers can be addressed by screening potential pilot agencies and educating a pilot agency and prospective Lead Contact Counsel prior to assignment.

5.0 Next Steps

GCD will continue to work with interested agencies to develop agency specific Lead Contact Counsel plans. GCD had intended to submit a Policy Option Package for the 2023-25 biennium to be considered by the 2023 Legislature. DOJ will only submit such a budget request if additional planning work can be completed in time with an updated pilot program report to the Legislature to support such a request.